IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

A.O.NO.868 OF 2004

IN

NOTICE OF MOTION NO 1773 OF 2004

IN

S.C.SUIT NO. 1305 OF 2004

Vijay M. Singh .. Appellant

vs.

Mr.Jokhan M. Singh & Ors .. Respondent.

Mr. Akhilesh Dubey, Advocate for the Appellant.

Mr.S.M.Shetty, Advocate for the Respondent No.1.

CORAM : A.S.OKA, J.

DATED : 1st February, 2005.

P.C. :

1. Admit. The learned Counsel appearing for the appellant prays that he may be permitted to delete the names of respondent Nos.2 and 3. The learned counsel appearing for respondent No.1 waives service. Office noting shows that the respondent No.4 is duly served. Considering the facts and circumstances of the appeal, it is taken

up for hearing forthwith.

2. The appellant is the original plaintiff. In the suit filed by him, he had taken out Notice of Motion No.1135 of 2003 for grant of interim reliefs. On 12.3.2004 the advocate appearing for the appellant/plaintiff was absent and therefore the learned trial Judge heard the motion and dismissed the same on merits by recording certain reasons. Notice of Motion No. 1773 of 2004 was taken out by the appellant/plaintiff for setting aside the order dated 12.3.2004 passed in Notice of Motion No.1135 of 2003 and for restoration of the said Notice of Motion. By the order impugned in this appeal, the said Notice of Motion No. 1773 of 2004 has been dismissed by the learned trial Judge. The learned trial Judge held that the earlier Notice of Motion cannot be restored as he had recorded reasons for dismissing the motion on merits.

3. The learned Counsel appearing for the appellant submitted that if the earlier motion was dismissed without hearing the appellant, the

learned trial Judge should have given a chance to re-argue the motion. The learned Counsel for respondent No.1 submitted that as issues are already framed in the suit, the trial can be expedited.

4. After having considered the submission made by the Counsel appearing for the parties and after perusing the documents on record of the Appeal, I am satisfied that a case was made out for setting aside the order dated 12.3.2004 passed in Notice of Motion 1135 of 2003 and for directing re-hearing of the said Notice of Motion. The appellant/plaintiff had engaged services of an advocate. The advocate was absent on the day on which the Notice of Motion was heard and, therefore, no submissions were made on behalf of the appellant/plaintiff. The learned Judge has purported to dismiss the Notice of Motion on merits. The learned Trial Judge ought to have taken liberal view of the matter and should not have allowed a litigant to suffer only because his advocate was absent.

5. It is true that by setting aside the order dated 12.3.2004, some prejudice will be caused to the respondent No.1. The same can always be compensated by ordering the appellant to pay costs. Hence, I pass the following order.

i) Impugned order dated 18.8.2004 passed in Notice of Motion 1773 of 2004 is quashed and set aside.

ii) The judgment and order dated 12.3.2004 in Notice of Motion No.1135 of 2003 is quashed and set aside and the Notice of Motion No.1135 of 2003 is restored to file. Notice of Motion No. 1773 of 2004 stands disposed of accordingly.

iii) The learned trial Judge will hear and decide the Notice of Motion 1135 of 2003 as expeditiously as possible. It is made clear that the said Notice of Motion stands restored only against respondent No.1/defendant No.1. It is also made clear that no ad-interim order will operate during the pendency of the said Notice of Motion No.1135 of 2003.

iv) The appeal is allowed in above terms. The appellant will pay costs of Rs.2500/-(Rupees Two Thousand Five Hundred Only) to the respondent No.1 within a period of four weeks from today.

. Parties to act on the authenticated copy of this order.

(A.S.Oka,J.)